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Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD HAGER, et al., for himself individually, and as representatives of all similarly situated persons,

Petitioners,

vs.

THE MAY DEPARTMENT STORES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are the due process rights of absent potential class members violated when the doctrine of collateral estoppel is used offensively by a defendant to preclude the assertion of class action allegations at any time after a prior lawsuit, brought by a different plaintiff, but alleging similar class-wide misconduct, was denied certification before another trial court from which notice of the denial of class certification did not issue to the affected potential class?

If an order denying class certification can *ever* be asserted by the defendant as a collateral estoppel bar to preclude a potential class member's attempt to certify their own class action in a subsequently filed lawsuit, must that subsequent class action be identical in all respects to the proposed class affected by the denial order, or can the collateral bar operate on proposed classes that are only "similar" to the first?

If an order denying class certification can *ever* be asserted by the defendant as a collateral estoppel bar to preclude a potential class member's attempt to certify a class action in a subsequently filed lawsuit, can the identity of counsel be considered as a factor in determining whether to apply the denial order as a collateral estoppel bar?

PARTIES TO THE PROCEEDING

Petitioner is Richard Hager, on behalf of himself, and on behalf of all others similarly situated. All other Plaintiffs have settled with Respondent.

Respondent is The May Department Stores Company.

CORPORATE DISCLOSURE STATEMENT

Since the filing of this action, The May Department Stores Company has been acquired in full by Federated Department Stores, Inc.

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Petitioner respectfully petitions for a writ of certiorari to review the Opinion of the California Court Of Appeal, Second Appellate District, Division Four, discretionary review of which was denied by the California Supreme Court

OPINIONS BELOW

The Opinion of the California Court Of Appeal, Second Appellate District, Division Four, (App. A) is reported at *Alvarez v. May Dept. Stores Co.*, 143 Cal.App.4th 1223, 49 Cal.Rptr.3d 892 (Cal.App. 2 Dist., 2006) . The trial court opinion sustaining Respondent's demurrer was not reported.

STATEMENT OF JURISDICTION

The order denying discretionary review by the California Supreme Court was entered on February 7, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. *See also, Howell v. Mississippi*, 543 U.S. 440, 442-443, 125 S.Ct. 856 (2005).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

> when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, which states, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The Gravamen Of The Underlying Action.

Petitioner is a former Area Sales Managers ("ASM") for Respondent The May Department Stores Company. Petitioners' Appendix submitted to California Court of Appeal ("PLNTFS. APP."), at 505.[1]

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[1] Pursuant to Rules of the Supreme Court, Rule 12.7, Petitioner herein cites to the record that is presently on file with the Clerk of the California Court of Appeal.

The Third Amended Complaint alleges violation of the overtime statutes (CAL. LAB. CODE § 1194, *et seq.*), conversion, violation of California's Unfair Competition Law (BUS. & PROF. CODE section 17200, *et seq.*, "UCL"), and violation of the Labor Code - Private Attorney General Act ("The Act", CAL. LAB. CODE §§ 2698-2699), for which Petitioner seeks, amongst other things, to recover unpaid overtime wages. *Ibid.*; *see*, PLNTFS. APP., at 295 - 334.

Petitioner seeks to represent the rights of other current and former ASMs.

B. Prior Suits Against Respondent

On July 15, 1997, Mark Gorman ("Gorman"), a former ASM, filed suit against Respondent, in a suit entitled *Gorman v. Robinsons-May*, Case No. BC 174606 ("*Gorman*"). PLNTFS. APP., at 102 - 126. Gorman sought certification of overtime wage claims and was denied. PLNTFS. APP., at 127 - 139. The plaintiff in the *Gorman* matter was found to be inadequate by the Trial Court. PLNTFS. APP., at 130 The order denying certification was final on February 20, 1999. PLNTFS. APP., at 505. *Gorman* was voluntarily dismissed. *Ibid.* One of Gorman's attorneys also represented Petitioner in the instant matter.

After *Gorman* terminated without a determination of the rights of ASMs, Janice Duran and Julia Ramos filed a class action suit against Defendant on September 9, 1999; the suit was entitled *Duran v. Robinsons-May*, Case No. RCV 42727 ("*Duran*"). PLNTFS. APP., at 140 - 147. Class certification was denied, the

Court of Appeal affirmed the denial, and a remittitur issued on August 5, 2003. PLNTFS. APP., at 148 - 154, 155 - 165, 166. The plaintiffs in the *Duran* matter were found to be atypical. PLNTFS. APP., at 151. The attorneys for Duran and Ramos also represent Petitioners in the instant matter. The individual claims of Duran and Ramos were settled.

C. Proceedings Below

Petitioner filed suit in the Los Angeles Superior Court against Respondent The May Department Stores Company on September 24, 2003. The initial Complaint was subsequently amended on several occasions.

Respondent Demurred to Petitioner's Third Amended Complaint ("TAC"), asserting that the denial of class certification in a different lawsuit, brought by different plaintiffs, precluded Petitioner Hager from even alleging a class action in this matter. PLNTFS. APP., at 394 - 416. In his Opposition, Petitioner argued that due process protections precluded Respondent from utilizing the doctrine of collateral estoppel offensively to bar the assertion of class allegations when Petitioner was not a plaintiff in any prior suit where class certification against Respondent was denied. PLNTFS. APP., at 507-512.

At the May 19, 2005 hearing of Respondent's Demurrer, Petitioner again raised due process protections as a ground for overruling Respondent's Demurrer. REPORTER'S TRANSCRIPT, May 19, 2005

proceedings, at 4-22. The Trial Court sustained Respondent's Demurrer to Petitioners' class allegations set forth in the TAC. PLNTFS. APP., at 560, 567 - 579.[2]

Petitioner appealed. In his Opening Brief, Petitioner again vigorously argued that due process considerations preclude use of the collateral estoppel doctrine to bar the assertion of class allegations by a plaintiff that was not party to an earlier suit in which certification was denied. Oral argument before the Court of appeal was held on August 11, 2006. At the hearing, the Second District ordered supplemental briefs on the following questions:

> Is there a due process right to be a class representative (as contrasted with the due process right to pursue a cause of action in one's own right)? How does the answer implicate the issues in this case?

On October 11, 2006, the Court of Appeal affirmed the Trial Court's Order. Petitioner then filed a Petition for Review with the California Supreme Court. That Petition also raised the due process issue. The California Supreme Court denied Petitioner's Petition for Review on February 7, 2007.

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[2] The Notice of Ruling, filed on August 3, 2005 and setting forth the Trial Court's Tentative Ruling of May 19, 2005, was prepared at the request of the Clerk of the Court of Appeal. The Clerk rightly identified the fact that the May 19, 2005 Tentative Ruling of the Trial Court was not included as a part of the Court's file. PLNTFS. APP., at 567 - 579.

ARGUMENT

I.

WHEN THE CALIFORNIA COURT OF APPEAL APPROVED THE USE OF COLLATERAL ESTOPPEL TO BAR SUBSEQUENT CLASS ACTIONS BY ABSENT PUTATIVE CLASS MEMBERS, IT DANGEROUSLY UNDERMINED THE DUE PROCESS PROTECTIONS PROVIDED BY THE U.S. CONSTITUTION AND PRIOR DECISIONS OF THE U.S. SUPREME COURT.

A. Collateral Estoppel May Not Be Invoked To Bar Claims By Persons Who Were Never Party To A Prior Suit.

1. Notice Must Issue Before Absent Class Members Can Be Bound By Any Decision Rendered In A Class Action Lawsuit.

> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329, 91 S.Ct. 1434 (1971). Due

process mandates adequate notice: "Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240 (1957).

In the class action context, this due process requirement is satisfied through notice to the class. California Courts have implicitly recognized the fact that due process requires class certification before absent putative class members are bound by the outcome. *See, e.g., Johnson v. American Airlines, Inc.*, 157 Cal.App.3d 427, 433, 203 Cal.Rptr. 638 (1984). As another panel of the Second District explained, "Absent such notification no member of the class need be bound by the result of the litigation." *Home Sav. & Loan Assn. v. Superior Court*, 42 Cal.App.3d 1006, 1011, 117 Cal.Rptr. 485 (1974) ("*Home Savings*").

This due process consideration explains the "ascertainability" requisite to class certification, because ascertainability "is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908, 914, 107 Cal.Rptr.2d 761 (2001). And more recently, one Court, commenting on class notices, explicitly rejected opt-in class actions in favor of opt-out classes, emphasizing the need for the fullest possible adjudication of claims and the reduction of individual

litigation. *Hypertouch, Inc. v. Superior Court*, 128 Cal.App.4th 1527, 1550, 27 Cal.Rptr.3d 839 (2005).

Thus, California has now diverged from the settled proposition that notice is necessary to bind absent class members. Due process rights are held by all absent class members, at all times. No authority exists for limiting those rights to post-certification orders, and the Second District offers no justification for imposing this limitation.

The result of the *Alvarez* decision will be the widespread denial of access to one of the most significant tools available to large groups of civil litigants: the class action device. When absent putative class members have received no notice that their access to this tool is in jeopardy, they must be provided their own opportunity to establish the propriety of resolving claims on a classwide basis.[3]

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[3] In California, the denial of certification must be appealed within 60 days. *Stephen v. Enterprise Rent-a-Car*, 235 Cal.App.3d 806, 812, 1 Cal.Rptr.2d 130 (1991); California Rules of Court, rule 2(a); *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 470, 174 Cal.Rptr. 515 (1981). Under the *Alvarez* result, absent putative class members would have to appeal the denial of class certification within 60 days of denial (despite having no notice of the denial), or they will face the prospect of having any "similar" class allegations barred at the pleading stage in any subsequent proposed class action that they file against the same defendant. This result raises the question of whether an absent putative class member in suit denied certification even has standing to appeal a denial of certification.

2. The *Alvarez* Decision Has Eliminated The Due Process Protection That Limits Application Of The "Sufficiently Close" Relationship Concept Of Privity.

> The limits on a state court's power to develop estoppel rules reflect the general consensus " 'in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940).... This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)."

Richards v. Jefferson County, Ala., 517 U.S. 793, 798, 116 S.Ct. 1761 (1996).

"Privity" has evolved and expanded over time into an amalgamation of diverse concepts. *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815, 820 (9th Cir. 1985). "Privity, traditionally, arose from a limited number of legal relationships in which two parties have identical or transferred rights with respect to a particular legal interest, chiefly: co-owners and co-tenants of property; decedents and their heirs, successors in interest and survival claimants; bailors and bailees; joint obligees; assignors and assignees; parties to a contract, and in some cases promisees and

third-party beneficiaries; indemnitors and indemnitees; corporations and their officers or shareholders; partners and their partnerships; and unincorporated associations and their members." *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052-1053 (9th Cir. 2005). The concept of "privity" has since expanded to include special relationships, such as where a governmental body, acting on behalf of its citizens, obtains a judgment that in conclusive as to those citizens, and, more recently, to situations in which the "relationship between the party to be estopped and the unsuccessful party in the prior litigation . . . is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." *Clemmer v. Hartford Insurance Co.*, 22 Cal.3d 865, 875, 151 Cal.Rptr. 285 (1978).

Unfortunately, "[t]he case law applying the virtual representation doctrine has been appropriately characterized as 'episodic' and lacking any 'clear pattern,' and it is therefore difficult to distill a generally applicable framework from the relevant precedent. *Kourtis v. Cameron*, 419 F.3d 989, 996 (9th Cir. 2005), citing 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4457, at 513 (2d ed. 2002). As a result of this uncertainty, it is essential the any collateral estoppel rule incorporate appropriate safety measures to ensure that due process is satisfied. "Because the concept of privity extends the reach of a judicial decision to nonparties and thereby deprives them of their own day in court, due process considerations make adequacy of representation a prerequisite to privity." *Kourtis, supra*, at 998. Courts have considered various factors when

determining whether due process concerns outweigh a finding of "privity." Reviewing those due process considerations, one Court said:

> "Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication . . . . [¶] A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance," for example, *by controlling it.* (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948- 949, 119 Cal.Rptr. 139; accord, *Clemmer, supra*, 22 Cal.3d at p. 875, 151 Cal.Rptr. 285, 587 P.2d 1098.)

Victa v. Merle Norman Cosmetics, Inc., 19 Cal.App.4th 454, 464, 24 Cal.Rptr.2d 117 (1993) [emphasis added]. Here, in total disregard for the well-established due process limitations on the concept of privity, California has created an absolute rule that absent class members are in privity with any plaintiffs bringing a class action, even when a trial court chooses not to certify the class. Such an unconstitutional expansion of the privity doctrine threatens potential class members everywhere, as California, which generally follows FED. R. CIV. P. 23 in its approach to class actions, is looked to for guidance by courts throughout the United States.

In *Richards*, this Court held, "Because petitioners

received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property." But here, *Alvarez* undermines this principle, applying class certification denials where no notice issued and where the proposed representatives were found to be atypical and inadequate as class representatives.

3. The *Alvarez* Opinion Has Denied Due Process By Holding That The Identity Of Counsel Affects Collateral Estoppel Analysis.

The *Alvarez* decision creates a dangerous rule of general application: the identity of counsel is an element that is considered when determining whether parties in two separate lawsuits are in privity with each other. This discordant ruling by the *Alvarez* Court will create adverse, unanticipated consequences to litigants everywhere.

California's decisional law acknowledges the "recognizably important right to counsel of his choice. . . ." *Comden v. Superior Court*, 20 Cal.3d 906, 915, 145 Cal.Rptr. 9 (1978). However, the *Alvarez* ruling will have the consequence of intruding upon that right, both in class actions and in individual lawsuits. Because that Court concluded that identity of counsel is a factor in collateral estoppel analysis, a client seeking representation in a potential class action must now

consider whether to seek counsel without experience against a defendant. The danger imposed by this rule cannot be understated:

> To find that an identity of attorneys presenting the same issue on behalf of different parties results in issue preclusion would promote attorney shopping, and tend to prevent parties from obtaining representation by chosen counsel familiar with an issue or matter in litigation. And to impose issue or claim preclusion essentially on the basis of prior adjudication of an identical issue would ignore the identity-of-parties requirement of collateral estoppel that is predicated upon due process principles.

Rodgers v. Sargent Controls & Aerospace 136 Cal.App.4th 82, 93-94, 38 Cal.Rptr.3d 528 (2006).

Instead, the *Alvarez* Court held, "We conclude that similarity of counsel is one factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit." *Alvarez,* 143 Cal.App.4th at 1237. As there is nothing about this holding that limits its application to class actions, it will be applied in individual any time a similarly aggrieved plaintiff seeks representation from an attorney with experience litigating a particular type of claim against a particular defendant. A defendant that prevails against one plaintiff on an important issue will assert that a different plaintiff cannot independently litigate the same *or similar* issue through the same attorney.

The spillover of the *Alvarez* ruling into individual litigation will create significant unintended consequences for litigants and counsel alike, chilling their ability to match up freely. Plaintiffs, in particular, will lose the benefit of counsel's experience with a particular type of claim against a particular defendant. This unintended outcome jeopardizes the claims of all potential plaintiffs anywhere that California decisional authority is considered even for its persuasive value.

B. At A Minimum, Due Process Considerations Cannot Permit The Dismissal Of Class Allegations Through Application Of The Collateral Estoppel Doctrine Where The Prior Proponent Of Certification Was Rejected On Typicality Or Adequacy Grounds.

Ignored by the *Alvarez* Opinion, the record below established that the plaintiff in the *Gorman* matter was found to be inadequate, PLNTFS. APPENDIX, at 130, and the plaintiffs in the *Duran* matter were found to be atypical, PLNTFS. APPENDIX, at 151.

The *Alvarez* decision creates a rule that precludes absent class members from asserting their own class allegations in a subsequent lawsuit when an earlier, similar lawsuit is denied certification for any reason. The *Alvarez* Opinion is constitutionally unsound. At a minimum, no plaintiff determined to be inadequate or atypical should ever be permitted to bind absent putative class members.

Similar to FED. R. CIV. P. 23, California Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . ." The party seeking certification must establish the existence of an ascertainable class and a well-defined community of interest among class members. "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 17 Cal.Rptr.3d 906 (2004). The second two prerequisites, typicality and adequate representation, focus on the desired characteristics of the class representative. 1 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS (4th ed. 2002) Typical Claims Or Defenses, Rule 23(a)(3), § 3:13. The existence of the adequacy and typicality factors sets a barrier past which due process rights would be violated, and the *Alvarez* ruling must be reviewed to protect against the persistent recurrence of that constitutional violation.

This Court has explicitly declared adequate representation in class actions as essential to the provision of due process: "[T]he Due Process Clause of course requires that the named plaintiff [in a class action] at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965 (1985); *accord Nevada v. United States*, 463 U.S. 110, 135 n. 15, 103 S.Ct. 2906 (1983), citing *Hansberry v. Lee*, 311 U.S. 32, 44, 61

S.Ct. 115 (1940), for the proposition that absent class members could not be bound where the class representatives "had interests that impermissibly conflicted with those of persons represented". This requirement of adequate and aligned interests is essential. "Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 396, 116 S.Ct. 873 (1996) (Ginsburg, J., concurring in part and dissenting in part).)

" ' "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." ' " *Mooney v. Caspari*, 138 Cal.App.4th 704, 720, 41 Cal.Rptr.3d 728 (2006). The reasonable expectation requirement cannot be satisfied if a plaintiff in a prior action sought certification and was found to be atypical or inadequate. The *Mooney* Court explains this reasoning:

> " 'The "reasonable expectation" requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, ***or*** if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped. [Citations.] Furthermore, due process requires that the party to be

> estopped must have had a fair opportunity to pursue his claim the first time. [Citation.]' [Citation.]" (*Old Republic Ins. Co. v. Superior Court, supra,* at p. 154, 77 Cal.Rptr.2d 642.)' "

Mooney, supra, 138 Cal.App.4th at 720, emphasis added. Absent putative class members can never form the expectation that an inadequate or atypical proposed class representative is serving in a representative capacity. In the first instance, the proposed representative, by definition, is incapable of representing the interests of absent class members, and in the second instance, the proposed representative, by definition, is not fully representing all of the claims of absent class members. In fact, citing to *In re Bridgestone/Firestone, Inc., Tires Products,* 333 F.3d 763 (7th Cir. 2003), the *Alvarez* Court quoted language indicating that absent class members are bound by a certification denial, *provided that the named representatives furnished adequate representation. Alvarez,* 143 Cal.App.4th at 1236.

At a minimum, the need to impose adequacy and typicality exceptions to the *Alvarez* Opinion strongly supports the granting of this Petition.

C. The Utility Of The Class Action Device Is Of Such Importance That It Must Be Safeguarded, And Its Renewed Assertion By An Absent Class Member Will Prejudice Neither Trial Courts Nor Defendant.

As Newberg on Class Actions succinctly states, "In numbers there is strength." 2 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS (4th ed. 2002) Advantages and Disadvantages of Class Actions, § 5:3. This pronouncement has been echoed by the United States Supreme Court:

> Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.

Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266, 92 S. Ct. 885 (1972).

California also recognizes that class allegations are essential to the vindication of substantive rights and critical for adequate protection of litigants:

> [A]s . . . cases of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the "procedural" label on such devices understates their importance

> and is not helpful in resolving the unconscionability issue.

Discover Bank v. Superior Court, 36 Cal.4th 148, 161, 30 Cal.Rptr.3d 76 (2005). After identifying the impact of class action allegations on substantive rights, *Discover Bank* rejected countervailing rationales, including the notion that the availability of attorney's fees provides an adequate substitute for the class device. *Discover Bank, supra*, 36 Cal.4th at 162. *Discover Bank*, following a long line of established precedent, confirms that class action allegations provide some essential *extra* to an individual claim that must be protected.

The substantive strength-in-numbers benefit of class actions is as evident in the employment law setting as it is in consumer class actions. *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340, 17 Cal.Rptr.3d 906 (2004). However, in the wage & hour setting, class actions provide to employees a further, substantive benefit: they insulate individuals from the fear and risk of suing one's employer individually. "[T]he risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified." *Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 449 (D.C.N.Y. 1976), *decision supplemented*, 458 F.Supp. 1147, *decision supplemented*, 497 F.Supp. 800, *revd. in part and affd. in part*, 650 F.2d 395 (2d Cir. 1981).

As Respondent did in this matter, defendants object to a trial court's consideration of a class certification motion on the ground that considering the motion is an unjust cost to them. The *Alvarez* Court

apparently accepted this argument, as much of its opinion emphasizes the threat of repeated class actions. This argument is a fallacy.

Despite clearly defined restrictions on the application of collateral estoppel, the Second District relied upon the rationale from *In re Bridgestone/Firestone, Inc., Tires Products* (7th Cir. 2003) 333 F.3d 763 to support its overbroad collateral estoppel rule. In doing so, the Second District succumbed to the *argumentum ad terrorem* that diminishes the rationale of *Bridgestone/Firestone*.

First, when critically examined, *Bridgestone/Firestone* does not represent a typical collateral estoppel decision. Rather it concerns the application of The Anti-Injunction Act, 28 U.S.C. § 2283 and the reach of federal power over state court actions.

Second, the *Bridgestone/Firestone* decision is inapposite to this matter, due to the unique aspects of the Bridgestone/Firestone decision. The *Bridgestone/Firestone* decision concerned a factually complicated, nationwide class action, with all the related problems posed thereby. The *Bridgestone/Firestone* Court enjoined a state court from certifying a nationwide class action after the Seventh Circuit Court of Appeals had determined that a nationwide class action was utterly unmanageable due to the extreme variation in facts, circumstances and state laws affecting class members:

> Classes comprising owners of more than 60 million tires and 3 million vehicles, including many different models, are

> unsuitable for several reasons, we concluded-not the least of which is that different rules of law govern different members of the class.

Bridgestone/Firestone, supra, 333 F.3d at 765. That decision did not (and could not) state that an individual state could not certify a state-wide class. In fact, it held to the contrary: "Indeed, our opinion contemplated that states would certify narrower classes. . . ." (*Bridgestone/Firestone, supra,* 333 F.3d at p. 766.) As this is a California state class action, there is no equivalent analogy to the nationwide/state dichotomy of *Bridgestone/Firestone*.

Finally, *Bridgestone/Firestone* falls prey to the same arguments that persuade the *Alvarez* decision. The *Bridgestone/Firestone* Court, setting up its straw-man argument, said:

> "Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% (0.9 = 0.349). Filing in 20 states produces an 88% probability of national class certification (0.9 = 0.122). This happens whenever plaintiffs can roll the dice as many times as they please-when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect."

Bridgestone/Firestone, 333 F.3d at 767. While this outcome is presented so as to sound terrifying and

unjust, it is a virtual impossibility. If multiple suits are filed simultaneously, the federal courts resolve this possibility through the MDL panel. States have a wide array of abatement procedures to prevent simultaneous litigation of identical cases.

If filed sequentially, the absence of tolling eliminates claims until, in fairly short order, none remain viable (assuming the defendant ends its wrongful conduct, which did not happen here). And, assuming one court in ten determines that certification is a tool it deems appropriate to use in a given case, and all ten courts are upheld on appeal, this fact provides no support for permitting one trial court to impose its sensibilities about case management on another trial court that is equally reasonable in the exercise of its discretion. Instead, it confirms the precept that trial courts should be permitted to exercise sound discretion in determining whether certification is, on balance, appropriate (and, as a corollary, they should be *required* to exercise that discretion).

D. The Second District's Opinion Undermines Decisions Regarding Statute Of Limitations Tolling In Sequentially-Filed Actions.

This Court's opinion, *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756 (1974), ushered in a series of decisions that, over time, analyzed if and how various statutes of limitation are tolled for absent potential class members during the period between the

filing of a proposed class action and the determination of the issue of certification. *American Pipe* determined that tolling existed for intervenors who joined a suit as individuals after certification was denied. In *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392 (1983), this Court extended the holding first outlined in *American Pipe* to include all absent potential class members.

Since *American Pipe* and *Crown, Cork & Seal Co.*, the Circuits have examined, with differing conclusions, the issue of whether an initial class action ever provides tolling for a subsequent class action filed by a putative class member after the initial class suit was denied certification. *See Yang v. Odom*, 392 F. 3d 97 (3rd Cir. 2004) for a discussion of the split between the Circuits. For example, the Ninth Circuit noted in *Catholic Social Services, Inc. v. I.N.S.*, 232 F. 3d 1139 (9th Cir. 2000) that since there is no rational basis for distinguishing between individual claims and class claims, there is no reason to deny tolling to a subsequent class action where an individual claim would also be timely.

While the exact approach varies by Circuit, the modern trend is to recognize tolling for a subsequent class action after an initial class action is denied certification. *Yang v. Odom* (3rd Cir. 2004) 392 F. 3d 97; *Catholic Social Services, Inc. v. I.N.S.*, 232 F. 3d 1139 (9th Cir. 2000). And it appears well-settled that, in no event, will tolling continue for subsequently filed class actions after an initial class was denied certification on anything other than unusual grounds, such as a determination that a plaintiff lacks standing to bring the claim. *See, e.g., Yang v. Odom* (3rd Cir. 2004) 392 F.

3d 97; *Catholic Social Services, Inc. v. I.N.S.*, 232 F. 3d 1139 (9th Cir. 2000); *Korwek v. Hunt*, 827 F. 2d 874 (2nd Cir. 1987); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994).

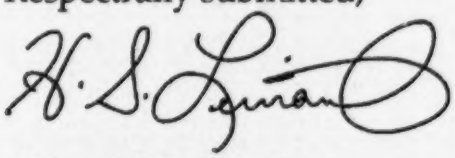
The *Alvarez* ruling simply ignores this line of authority, highlighting a logical fallacy in the Court's decision. *American Pipe* and its progeny, such as *Crown, Cork & Seal* and the Circuit decisions, could not exist under the *Alvarez* collateral estoppel rule because there could *never* be an issue of statute tolling for subsequent class actions: no subsequent class action against the same defendant could ever be filed once the first class action was filed but not certified. By ignoring the sequential tolling decisions, the *Alvarez* threatens to vitiate them despite having to actual authority to do so.

The fact that subsequent class actions, alleging the same delict, against the same party, may eventually lose *American Pipe* tolling answers the persecution straw man argument raised by Respondent and the *Alvarez* Court. The passage of time restricts the number of such actions that can be maintained for the same wrong against the same defendant. However, where a defendant fails to correct unlawful conduct directed at a class, that defendant *should* be subjected to renewed scrutiny in the form of subsequent class actions addressing the ongoing wrongful behavior. And where a trial court determines - after exercising its sound discretion, that a case before it is best managed as a class, such a determination should not be wrested from it by a prior trial court that declined to utilize the class action device.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX A - OPINION OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, DATED AND FILED OCTOBER 11, 2006

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSE ALVAREZ et al., Plaintiffs and Appellants, v. MAY DEPARTMENT STORES COMPANY, Defendant and Respondent.	B184504 (Los Angeles County Super. Ct. No. BC303042)

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Arias, Ozzello & Gignac, H. Scott Leviant, Mike Arias, and Mark A. Ozzello; Law Offices of Jeffrey P.

Spencer and Jeffrey Spencer for Plaintiffs and Appellants.

Wasserman, Comden & Casselman, John S. Curtis; Law Offices of Julia Azrael, Julia Azrael; and David E. Martin for Defendant and Respondent.

Plaintiffs and appellants,[1] 56 past and present "Area Sales Managers" (ASM's) employed by defendant and respondent the May Department Stores Company (respondent), alleged both individual and class-action claims for failure to pay overtime compensation (Lab. Code, §§ 1194, 1198), conversion, violation of the unfair practices law (Bus. & Prof. Code, § 17200 et seq.), and violation of the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.). Based on the doctrine of collateral estoppel, the trial court sustained without leave to amend respondent's demurrer to the complaint's class action

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1 Plaintiffs and appellants are: Jose Alvarez, Margo Arias, Maria Bocanegra, Vincent Bonnemere, Cynthia Byrd, Chester Espino, Andrea Fannon, Kim Gensch, Nicole Giebel, Lynn Halo-Gerber, Paul Harris, Selma Hovsepian, Ronald Jackson, Alice Leedom, Leah Lindberg, Margaret Mackinnon, Amber Polo, Margaret Sommer, Sarah Statz, Eileen Trujillo-Cameron, Roy Valdivia, Laura Zarate, Kylie Tigard, Dinafay Crandell, Kimberly DeWolfe, Matthew Finch, Timothy Frank, Michael Jalaty, Chrystine Johnson, Harold Katzman, Cathy Knox, Cynthia Madison, Angelica Madrigal, Tasha Southerland, Debi Brewer, James Gardner, Paula Gardner, Richard Hager, Belinda McCauley, Steven Pitts, Shane Price, Gerardo Torres, Kelly Tran, Leslie Garcia, Omar Leiva, Kimberly Frye, Stacey McClure, Yvonne Pfrimmer-Lopez, Zora Zizich, Stephanie Bunch, Gina Marchand, Bonnie Brown, Steven Esperanza, Carey Holland, Claudette Michaud, and Darren Muth.

allegations and this appeal followed.[2]

Appellants seek reversal of the order, claiming that the doctrine of collateral estoppel is inapplicable to an order denying class certification in another lawsuit brought by other plaintiffs because absent putative class members are not bound prior to the certification of a class. Alternatively, appellants contend that the doctrine of collateral estoppel was erroneously applied to the facts of this case. For the reasons set forth below, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit was initially filed in September 2003. It is one of several lawsuits filed by appellants' counsel against respondent on behalf of ASM's who were classified as "exempt" employees, and thus not paid overtime wages, although they worked more than 40 hours per week.

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[2] Although an order sustaining a demurrer without leave to amend is not an appealable order, "an order, whatever form it may take, which has the effect of denying certification as a class action, is an appealable order. [Citations.]" (*Morrissey v. City and County of San Francisco* (1977) 75 Cal.App.3d 903, 907.)

The Gorman Case

In July 1997, appellants' counsel filed a class action against respondent in Los Angeles County Superior Court (*Gorman v. Robinsons-May, Inc.*, BC174606 (*Gorman*)). The purported class in *Gorman* consisted of approximately 612 "current and former employees of Defendant Robinsons Department Stores within the states of California, Arizona and Nevada, holding the position of a salaried manager designated by Robinsons as an Area Sales Manager within the last three (3) years." The claims arose out of the alleged "illegal designation of Area Sales Managers as exempt employees and the failure of Defendants, and each of them, to pay Area Sales Managers overtime compensation." The complaint alleged: failure to pay overtime compensation in violation of the Labor Code, unfair business practices (Bus. & Prof. Code, § 17200 et seq.), fraud, and negligent misrepresentation, and prayed for compensatory damages and injunctive relief. Generally, it claimed that the ASM's performed many of the same functions as the nonexempt employees, but were told that they were not entitled to overtime pay.

The trial court denied class certification in *Gorman* in December 1998, stating that the plaintiffs had failed to demonstrate a community of interest or an ascertainable class and that the proposed class representatives were unsuitable because they had unsatisfactory employment histories.

The Duran Case

In September 1999, appellants' counsel, in association with other attorneys, filed another class action in San Bernardino County Superior Court against respondent on behalf of ASM's, alleging causes of action for failure to pay overtime wages, unlawful business practices, and conversion (*Duran v. Robinsons-May, Inc.*, RCV42727 (*Duran*)). The complaint in *Duran* alleged that all ASM's performed the same duties and the job is a standardized one completely lacking in independent discretion.

After an evidentiary hearing, the trial court denied a motion to certify the class in *Duran* with respect to the Labor Code and conversion causes of action. The Court of Appeal affirmed the order in an unpublished opinion filed April 18, 2003. (*Duran v. Robinsons-May, Inc.*, E031288.) The Court of Appeal opinion held that the declarations submitted in support of the motion established that the 1600 class members' interests were so dissimilar that "it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in their interests. Common questions of fact could not predominate."

This Case

In September 2003, appellants' counsel filed the present complaint on behalf of current and/or former ASM employees against respondent. It alleged that respondent intentionally and improperly designated

them as exempt to avoid payment of overtime wages and other benefits.

Respondent demurred to the third amended complaint (TAC) based on the grounds that an order denying certification of the same class was issued in *Duran* and thus appellants were barred from relitigating the issue under the doctrine of collateral estoppel. In addition, respondent claimed that the claims arising before February 1999 were barred by the statute of limitations.

The demurrer was argued on May 19, 2005, and taken under submission. On June 27, 2005, the court issued an order sustaining the demurrer without leave to amend as to the class action allegations and with leave to amend as to the claims arising before February 1999. The trial court's order stated, inter alia, "Two cases preceded the filing of this case, *Gorman* and *Duran*. Both cases sought to certify a class of current and former ASMs of Robinsons-May.... [¶] Plaintiffs argue that under federal law, the denial of class certification is never binding on absent putative class members .... Defendant's reply persuasively refutes plaintiffs' argument .... [¶] Plaintiffs do not argue that defendant failed to establish the required elements for application of collateral estoppel ... except privity .... Defendants persuasively respond to plaintiffs' argument...."

The court also ordered all proceedings stayed once appellant filed a notice of appeal from the order on the demurrer.

CONTENTIONS ON APPEAL

Appellants contend that the court erred in sustaining the demurrer because: (1) the class allegations cannot be resolved by way of a demurrer; (2) the *Gorman* and *Duran* cases had no plaintiffs in common with this case and thus the refusal in those cases to certify the class is not binding; (3) the principles of res judicata are inapplicable to this case; (4) respondent's issue preclusion argument was rejected in the *Duran* case by the Court of Appeal for the Fourth Appellate District; and (5) respondent's demurrer was frivolous and based upon non-citable authority.

DISCUSSION

A. The Resolution of Class Certification on Demurrer

Code of Civil Procedure section 382 authorizes a class suit where a party can establish an ascertainable class and a well-defined community of interest. The community of interest requirement is satisfied by a showing of "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 (*Sav-On*); *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106.)

"'Class actions will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.' [Citation.] '[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case.'" (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 118; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397.)

When an appellate court reviews a ruling on demurrer, its only task "is to determine whether the complaint states a cause of action." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) "An appellate court must affirm if the trial court's decision to sustain the demurrer was correct on any theory. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808.)

Trial courts properly and routinely decide the issue of class certification on demurrer. "When class certification is challenged by demurrer, 'the trial court must determine whether "there is a 'reasonable possibility' plaintiffs can plead a prima facie community of interest among class members. . . ." [Citation.] "'The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally

compel the dismissal of such inappropriate actions at the pleading stage." [Citation.]'" (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101, quoting *Silva v. Block* (1996) 49 Cal.App.4th 345, 349-350.)

It may be proper at the pleading stage to strike class allegations if the face of the complaint and other matters subject to judicial notice reveal the invalidity of the class allegations. (*Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5.) An evidentiary hearing on the appropriateness of class litigation is not necessary unless there is a "reasonable possibility" that the plaintiff can establish a community of interest and ascertainable class. (*Ibid.*)

B. The Effect of the Duran Ruling

1. *Duran* Case

The *Duran* complaint defined the potential class as "All current and former Employees of Robinson-May, Inc., holding the position of a salaried manager designated by Robinson-May, Inc. as an Area Sales Manager, and who worked more than eight (8) hours in any given day and/or more than forty (40) hours in any given week, during the period September 9, 1995 to the present and who were not paid overtime compensation pursuant to applicable *Cal. Labor Code* requirements."

Similarly, the TAC in this case defines the potential class as "all current and former employees of

[respondent], holding the position of a salaried manager designated by [respondent] as an 'Area Sales Manager' (sometimes referred to herein as 'ASM'), and who worked more than eight (8) hours in any given day and/or more than forty (40) hours in any given week and who were not paid overtime compensation pursuant to applicable *Cal. Labor Code* requirements."

The complaint in *Duran* alleged that ASM's should not have been classified as exempt employees because they spent more than 50 percent of their time on nonmanagerial tasks and thus are entitled to overtime pay. The *Duran* plaintiffs contended that all ASM's perform the same standardized work as dictated by Robinsons-May. They claimed ASM's lack discretion and independence in merchandising, hiring, and supervising decisions. The declarations submitted by each of the parties (38 from plaintiff and 60 from defendant, in addition to excerpts from numerous depositions) ranged from those who worked only on nonexempt tasks to those who regarded their work as executive and discretionary in nature. The Court of Appeal held that "[I]f a similar split in opinion exists company-wide among ASMs, it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in their interests. Common questions of fact could not predominate among the 1600 ASMs."

In this case, as in *Duran*, the TAC alleges that respondent required the ASM's to work more than 40 hours per week, but they were all classified as exempt and received no overtime pay. Appellants contend they spend more than 50 percent of their time

performing nonexempt duties, that their job duties are standardized, and that they lack discretion or independent judgment in merchandising, hiring, and supervising decisions.

2. Collateral Estoppel

Collateral estoppel is a doctrine which prevents relitigation of issues previously argued and resolved in a prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) In order to apply this principle: (1) the issue must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision must have been final and on the merits; and (5) preclusion must be sought against a person who was a party or in privity with a party to the prior proceeding. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481, citing *Lucido, supra.)*

"[I]n deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875.)

The initial question we must answer is the following: What is the precise nature of appellants' right at issue here? Our decision will not eliminate

appellants' substantive right to bring their lawsuit. Instead, it could potentially deny them the ability to serve as a representative of other litigants. The distinction may be crucial when we balance appellants' due process rights against the competing interests promoted by the doctrine of collateral estoppel. If the right to proceed as a class plaintiff is a property right, we must keep in mind the general principle "in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (*Hansberry v. Lee* (1940) 311 U.S. 32, 40 (*Hansberry*).)

Appellants assert the right to be a class representative is inextricably tied to the right to pursue a personal claim. They argue that the power of the class action lawsuit provides the individual plaintiff with the means to successfully combat a social injustice that might otherwise go unabated. They conclude that "a due process right to be a class representative must be recognized in light of the fact that the mere assertion of class allegations causes a defendant to recognize greater potential risk ... in an individual litigant's claims, a *substantive* effect."

Respondent argues that the interest in the right to sue as a class is not a protected property right. It argues while the courts have recognized that class actions facilitate the court's ability to manage a lawsuit and achieve substantial justice in a particular case, the tool is subject to appropriate limitations.

In comparing other forms of representative

lawsuits, our Supreme Court has reached the same conclusion. In *Hogan v. Ingold* (1952) 38 Cal.2d 802, the court discussed the rights of a shareholder who complained that limitations placed on her ability to bring a derivative suit deprived her of a valuable property right. The court wrote: "This contention cannot be sustained; a person has no property right in being appointed or in acting on his own nomination as a guardian *ad litem*. He may nominate himself but he cannot compel the court to accept his nomination; he has no property right to be accepted by the court to institute and maintain an action in the right of another on terms beyond the control of the court or the Legislature." (*Id.* at p. 809.)

In *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, referring to the right under Business and Professions Code section 17200 to bring lawsuits as a representative of the public, the court cited *Hogan* and affirmed its holding that "the interest in suing on another's behalf is not a property right beyond statutory control." (*Id.* at p. 233.)

Appellants give no reason why a class plaintiff has any greater right to serve as a representative than a shareholder in a derivative action or a representative of the public in an unfair competition suit. That appellants cannot is not surprising. There is no such right. We conclude that there is a distinction between using a prior ruling to bar a litigant from receiving a hearing on the merits and applying a prior decision to prevent a litigant from proceeding as a class representative.

Nonetheless, appellants assert that the holding in *Duran* cannot bar their attempt to certify a class. They claim "[i]t is an established rule of law that, in an action not certified as a class, the outcome of that action is binding only on the named parties." They urge that is the rule "throughout the entire country regarding the res judicata effect of denial of certification on absent putative class members." In particular, appellants cite *Bittinger v. Tecumseh Products Co.* (6th Cir. 1997) 123 F.3d 877, 880-881 (*Bittinger*). Appellants overstate their case.

In *Bittinger*, plaintiffs, acting individually and on behalf of a class of former employees, filed suit. The court granted defendant's motion for summary judgment, *but did not reach the question of class certification.* (*Bittinger, supra,* 123 F.3d at p. 879.) Bittinger, who was not an original plaintiff, brought suit on behalf of the same class. The trial court dismissed the class claims, relying on the doctrine of res judicata. The appellate court reversed, concluding that Bittinger could not be bound by the prior decision.

Bittinger does not assist appellants because the court did not hold that absentee class members may never be bound by a prior ruling denying class certification. Nor did the court hold that class certification was necessary to bind absent class members. The case merely affirmed the basic principles of issue preclusion. In order to prevent the relitigation of an issue, that issue must have been decided in the prior proceeding, and the class issue was not decided in the first action. The other cases cited by appellant provide no support for their view. None of

the cases deals with the question whether a court may enforce a prior class decision on litigants in a subsequent action.

Appellants cite the principle we acknowledged above and the United States Supreme Court reiterated in *Richards v. Jefferson County* (1996) 517 U.S. 793, that it would violate the Due Process Clause of the Fourteenth Amendment to bind a party to a judgment rendered in a prior lawsuit in which the party was not present or adequately represented. However, the *Richards* court recognized there are exceptions to the general rule, as outlined in *Hansberry*. "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." (*Hansberry, supra,* 311 U.S. at p. 41.) Appellants are incorrect when they assert that absent class members may never be bound by prior litigation.

Respondent directs us to a federal case which deals squarely with the issue whether collateral estoppel may be applied in the class certification arena. In *In re Bridgestone/Firestone, Inc., Tires Products* (7th Cir. 2003) 333 F.3d 763 (*Bridgestone/Firestone*), plaintiffs attempted to certify a national class in the district court. The trial court granted certification, but its decision was reversed on appeal. Plaintiffs then filed a number of suits in various jurisdictions seeking to certify the same class. When one state court certified the class, defendants, pursuant to title 28 United States Code section 2283, sought an anti-class action injunction from

the federal court to enforce its earlier ruling.

In analyzing the issue, the court distinguished between non-class and class situations. "'Virtual representation,' a doctrine that we disapproved in *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), would permit the outcome of one non-class suit to control another if the plaintiffs are similarly situated; *Tice* holds, to the contrary, that, outside the domain of class actions, precedent rather than preclusion is the way one case influences another. Our suit, by contrast, was commenced as a class action, and one vital issue was litigated and resolved on a class-wide basis: whether a *national* class is tenable. Absent class members are bound provided that the named representatives and their lawyers furnished adequate representation, which they did." (*Bridgestone/Firestone, supra,* 333 F.3d at p. 769.)

The plaintiffs in *Bridgestone/Firestone* argued that absent members could not be bound because they had not been provided notice and an opportunity to opt out of the certification decision. The court stated: "[N]o statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step." (*Bridgestone/Firestone, supra,* at p. 769.) The court concluded, "[e]very person included in the district court's class definition still has the right to proceed on his own. What such a person now lacks is the right to represent a national class of others similarly situated; that's the upshot of a fully contested litigation in which every potential class member was adequately represented on this issue." (*Ibid.*)

We agree with the federal court's reasoning. When a prevailing party seeks to enforce a ruling denying class certification against an absent putative class member, the general principles of collateral estoppel apply. Those principles ensure that the absent party's interest was adequately represented in the prior proceeding. Thus, we turn to the facts of our case, noting that appellants argue they are not in privity with the *Duran* plaintiffs and the *Duran* court did not decide the identical issue.

Collateral estoppel requires that the party in the earlier case have interests sufficiently similar to the party in the later case, so that the first party may be deemed the "virtual representative" of the second party. (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070-1073 (*Citizens*).) Or the first party must be acting in a representative capacity for the second party. (*Gates v. Superior Court* (1986) 178 Cal.App.3d 301, 307.) "The emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion. [Citations.]" (*People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931, 937.)

The *Duran* complaint and the TAC allege respondent engaged in the same general misconduct concerning the same policies and procedures. Both complaints allege the misconduct took place during approximately the same time period. The parties sought certification of the same class of employees. In fact, in the trial court, appellants conceded that the class

in the *Duran* action included, by definition, appellants. The *Duran* plaintiffs and appellants sought class certification using the same attorneys and there is no allegation that the representation provided to the plaintiffs in *Duran* was inadequate. Although the causes of action are not identical, the principle of collateral estoppel does not depend on the legal theory used but the primary right asserted. (*Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 992; *Johnson v. American Airlines, Inc.* (1984) 157 Cal.App.3d 427, 432.) The primary right asserted in each case was the right to litigate claims in a class action lawsuit.

Appellants cite *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82 for the proposition that the same counsel's representation of different plaintiffs in successive actions is a factor this court should not consider in determining issues of privity or adequacy of representation. Appellants read too much into the *Rodgers* opinion. The court decided "[t]hat appellant is represented by the same counsel as were the plaintiffs in the prior actions does not, we conclude, suffice to extend the doctrine of privity *to his case.*" (*Id.* at p. 93, italics added.) The *Rodgers* court did not hold that the identity of counsel is never relevant. We conclude that similarity of counsel is one factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit.

Appellants do not claim that their interests were not adequately represented in the *Duran* case. Indeed, it would be difficult to make such an argument. In

Duran, the trial court considered 38 declarations of ASM's presented by the plaintiffs, 60 declarations of ASM's presented by the defendants, declarations by other employees, and deposition testimony offered by both parties. Appellants do not argue that there is any evidence or argument that the *Duran* plaintiffs failed to present.

"In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." (*Citizens, supra,* 60 Cal.App.4th at p. 1070.) "Whether someone is in privity with the actual parties requires close examination of the circumstances of each case." (*People v. Henderson* (1990) 225 Cal.App.3d 1129, 1151.)

In analyzing the facts, we conclude the *Duran* plaintiffs were the "virtual representatives" of appellants. The only difference we can discern between the parties is the name of the representative plaintiff. The interested parties, their claims, and their counsel are the same. We also examine whether the first party had the same interest as the precluded party and the motive to present the same claim. (*Clemmer, supra,* 22 Cal.3d at p. 877.) The *Duran* plaintiffs had a strong motive to assert the same interest as appellants, as each group's goal was identical--each wanted its class certified. As noted, the *Duran* plaintiffs had a full opportunity to present their case. The circumstances are such that appellants should reasonably have expected to be bound by the *Duran* decision. As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by

the effect of the decision against them. Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims.

3. Notice

Appellants argue that they cannot be bound by the *Duran* decision because a class has not yet been certified. They claim that "until certification has been granted and adequate notice of class certification has been sent, the absent class members are not bound by the rulings in the case." They cite *Home Sav. & Loan Assn v. Superior Court* (1976) 54 Cal.App.3d 208, 212 (*Home Savings*), in support of their assertion. Their argument misses the mark.

Home Savings merely restated the general rule that a class member who does not receive notice of litigation may not be bound by the result. The court did not hold that an absent class member may *never* be bound by a prior ruling or that only rulings pertaining to a certified class can be enforced in subsequent litigation. Moreover, the court did not decide the issue when notice to absent class members was required for purposes of collateral estoppel.

In *Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491 (*Frazier*), plaintiffs argued they should not be bound by a ruling in a previous case. They also cited *Home Savings* and claimed they were entitled to notice of the prior proceeding. The *Frazier* court noted

the *Home Savings* panel "never addressed *whether* notice was required," and appeared to deem its case to be one where notice is mandatory under the federal rules. (*Id.* at p. 1501.)

More importantly, *Home Savings* addressed the issue of notice after a class is certified. We agree with the conclusion of the *Bridgestone/Firestone* court that notice is a post-certification requirement. We see no statutory mandate or equitable principle that demands that notice of an unsuccessful attempt to certify a class be sent to all putative class members prior to binding a litigant who seeks to certify the same class. As discussed, we conclude that due process is satisfied when an absent class member's interest is adequately represented. (*Johnson v. American Airlines, Inc., supra,* 157 Cal.App.3d at p. 433.)

4. Identity of Issues

Relying on *Sav-On, supra,* 34 Cal.4th 319, appellants urge they cannot be bound by the *Duran* decision because the law on class certification has changed since that court issued its opinion. Thus, appellants conclude, the *Duran* court did not decide the same issue presented in the instant case. They are incorrect. The *Sav-On* court resolved the question of "whether the trial court abused its discretion in certifying as a class action this suit for recovery of unpaid overtime compensation." (*Id.* at p. 324.) The court evaluated the evidence presented in the trial court and did not change the standards for class certification,

citing *Lockheed Martin Corp., supra,* 29 Cal.4th 1096, 1106, which had recently reviewed those standards. (*Sav-On* at p. 326.) The *Lockheed Martin Corp.* case was the law relating to class certification standards when the *Duran* court affirmed the trial court's order denying certification.

Appellants further argue that the *Sav-On* decision eliminated the legal basis for the Court of Appeal's affirmance in *Duran* of the order denying class certification. Appellants contend that because the *Sav-On* decision "clarified the scope of the holding in *Ramirez v. Yosemite Water* [*Co.*] [(1999)] 20 Cal.4th 785 . . . , which was relied upon exclusively by the Court of Appeal in *Duran,*" the "continued reliance upon *Ramirez* in overtime class actions is misplaced." Appellants state that because "[u]nder virtually identical facts, the *Sav-On* Court has determined that wage and hour cases such as the instant matter are suitable for class [action] treatment[,] it is not just plausible, it is likely, that Plaintiffs can successfully allege *and* certify a UCL class action."

Appellants, however, have overstated the Court of Appeal's reliance upon *Ramirez* in upholding the denial of class certification in *Duran.* Although the appellate opinion in *Duran* cited to *Ramirez,* it did so only in passing and without any explanation of whether or how the facts of *Duran* were similar to those in *Ramirez.* Moreover, the mere reinstatement of the order granting class certification in *Sav-On* based on the finding that the trial court did not abuse its discretion does not suggest that the facts of this case would compel the trial court, as a matter of law, to grant class

certification.

Finally, appellants contend that the trial court could not rely on the *Duran* decision, as it was an unpublished opinion. The trial court was entitled to take judicial notice of the decision denying class certification as it was "relevant under the doctrines of law of the case, res judicata, or collateral estoppel." (Cal. Rules of Court, rule 977(b)(1).)

Although appellants assert for the first time in their reply brief that public policy demands that the doctrine of collateral estoppel not be applied here, we are not persuaded. Put simply, if appellants are correct, every motion denying class certification could be relitigated until the desired result was reached. The losing class plaintiff could merely insert the name of a different individual to be the potential class representative. When appellants' counsel was asked in oral argument when the string of unsuccessful lawsuits would end, his answer in essence was--when the pursuit is no longer economically feasible.[3] We disagree.

"The class action is a product of the court of

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[3] Indeed, in association with other attorneys, counsel is involved in a fourth case seeking to certify the same class in Orange County Superior Court. (*Bracamonte v. The May Department Stores Company*, Case No. 05CC00129.) The case was filed after the trial court issued its tentative ruling in this matter sustaining respondent's demurrer.

equity--codified in section 382 of the Code of Civil Procedure." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) It is manifestly unfair to subject respondent to a revolving door of endless litigation. In cases, such as this one, where a party had a full opportunity to present his or her claim and adequately represented the interests of a second party who seeks the same relief, principles of equity, "'[p]ublic policy and the interest of litigants alike require that there be an end to litigation.' [Citation.]" (*Citizens, supra,* 60 Cal.App.4th at p. 1065.)

C. Effect of Duran Writ Petition

Appellants contend that the matter of issue preclusion was already presented and rejected in the *Duran* case. The assertion is unavailing. The *Duran* court decided the *Gorman* case could not collaterally estop the *Duran* plaintiffs from certifying its class, but it did not determine whether collateral estoppel could apply to future certification efforts. The question we answer today is whether the *Duran* decision, which followed a full hearing on the merits, bars these appellants from seeking class certification.

DISPOSITION

The order is affirmed. Respondent is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

APPENDIX B – ORDER OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, GRANTING PERMISSION TO FILE PETITION FOR REHEARING AND DENYING PETITION FOR REHEARING, DATED AND FILED NOVEMBER 13, 2006

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSE ALVAREZ et al.,

v.

THE MAY DEPARTMENT STORES COMPANY,

B184504

(Los Angeles County Super. Ct. No. BC303042)

THE COURT:

Permission to file appellants' petition for rehearing is granted. Appellants' petition for rehearing is denied.

APPENDIX C - ORDER OF THE CALIFORNIA SUPREME COURT, DATED AND FILED FEBRUARY 7, 2007

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSE ALVAREZ et al., Plaintiffs and Appellants,

v.

MAY DEPARTMENT STORES COMPANY, Defendant and Respondent.

Petition for review DENIED.
The request for an order directing depublication of the opinion is denied.

Kennard, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

No. 06-1486

FILED
JUN 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RICHARD HAGER,
Petitioner,

v.

MAY DEPARTMENT STORES COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Second Appellate District

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CORPORATE DISCLOSURE STATEMENT

On August 30, 2005, after the filing of this action, Federated Department Stores, Inc. acquired Respondent The May Department Stores Company. On June 1, 2007, Federated Department Stores, Inc. changed its name to Macy's, Inc. Macy's, Inc. is a publicly traded corporation.

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STATEMENT OF THE CASE

After multiple California courts entered final judgments denying class certification to a putative class of employees for the purpose of recovering overtime pay, Petitioner filed this action seeking to certify the same class for the purpose of recovering the same overtime pay. As in the earlier cases, Petitioner, a former area sales manager at one of Respondent's department stores, contends that Respondent improperly classified him as an exempt employee to avoid paying overtime wages and asserted causes of action under California's Wage and Hour Laws (Cal. Lab. Code § 1194, *et seq.*), California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), California's Labor Code Private Attorney General Act (Cal. Lab. Code § 2698, *et seq.*), and for conversion. Despite final and conclusive judgments denying certification in the earlier cases, Petitioner contends he has a constitutional right to re-litigate the same class certification issue.

A. Earlier Area Sales Manager Class Actions

1. *Gorman v. Robinsons-May, Inc.*

In July 1997, Mark Gorman, a former area sales manager, filed a class action against Respondent in Los Angeles Superior Court ("*Gorman*") contending that Respondent improperly classified him as an exempt employee to avoid paying overtime wages and asserting causes of action under California's Wage and Hour Law and Unfair Competition Law as well as for fraud and negligent misrepresentation. (Plaintiffs' Appendix in the California Court of Appeal ("Plntffs. App."), at 103-125.) In December 1998, after extensive discovery and three certification hearings, the trial court refused to certify the proposed class and held that both

Gorman and his substitute class representative had failed to demonstrate the existence of a well-defined community of interest, including the predominance of common issues of law and fact. (Plntffs. App., at 128-139.) In addition, the trial court held that the class representatives were inadequate as they were former employees who had experienced problems performing their management duties. (*Id.*)

2. *Duran v. Robinsons-May, Inc.*

In September 1999, after the decision in *Gorman* was reduced to a final judgment, Janice Duran and Julia Ramos, present and former area sales managers represented by the same counsel as in *Gorman*, filed another class action against Respondent in San Bernardino Superior Court ("*Duran*"). (Respondent's Appendix in the California Court of Appeal ("Resp. App."), at 594-608.) As in *Gorman*, Duran and Ramos contended that Respondent improperly classified them as exempt employees to avoid paying overtime wages and asserted causes of action, dating from September 1995 to the present, under California's Wage and Hour Laws and Unfair Competition Law as well as for conversion.

In February 2002, the trial court, after reviewing a voluminous record consisting of hundreds of deposition transcripts, declarations, and exhibits, held that Duran and Ramos could not, among other things, establish the requisite community of interest to justify certification of their proposed class for their wage and hour and conversion causes of action because they could not demonstrate "that there are common questions of fact as to class members which predominate over questions of fact which affect individual class members." (Plntffs. App., at 149-154). In April 2003, the California Court of Appeal, Fourth Appellate District, affirmed, holding that "[c]ommon questions of fact could not predominate" and

declining to consider alternate grounds for the trial court's decision (i.e., typicality or adequacy of representation).[1] (Plntffs. App., at 156-165.) In August 2003, the Court of Appeal issued its remittitur to the trial court. (Plntffs. App., at 463.)

In January 2005, following the enactment by the California voters of Proposition 64, which precluded Duran and Ramos from proceeding as private attorneys general under their Unfair Competition Law cause of action without first satisfying the class action requirements, Duran and Ramos sought leave to amend their complaint to assert class allegations for that cause of action. The trial court refused to grant Duran and Ramos' request and reasoned as follows:

> . . . [T]he issue of class certification of the purportedly nonexempt area sales managers working for Robinsons-May has already been determined against plaintiffs in this case. Styling the same alleged Labor Code violations as unfair competition does nothing to change the fact that the Court of Appeal has already affirmed the trial court's denial of class certification for the same allegedly unlawful underlying conduct . . .. It is the existence of a final decision on these same class certification issues against plaintiffs which bars re-litigation and makes the proposed amendment improper. California does not, as a matter of precedent or policy, allow re-

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[1] In California, the denial of class certification is an appealable order which, if it is not appealed or if it is sustained on appeal, becomes a final and binding determination of that issue. *Daar v. Yellow Cab Co.*, 67 Cal. 2nd 695, 698-699 (1967); *Enterprise Rent-A-Car*, 235 Cal. App. 3rd 806, 811 (1991).

> litigation of whether to certify a class once a death-knell order denying certification has become final. *Stephen v. Enterprise Rent-A-Car*, 235 Cal. App. 3rd 806, 817 [1991].

(Resp. App., at 642-644.)

B. Proceedings Below

In September 2003, immediately following the issuance of the remittitur in *Duran*, 64 individual area sales managers, represented by the same counsel as in *Gorman* and *Duran*, filed the present action in Los Angeles Superior Court ("*Alvarez*"). Petitioners' counsel again alleged that Respondent improperly classified plaintiffs as exempt employees to avoid paying overtime wages and asserted causes of action, dating from at least September 1995 to the present, under California's Wage and Hour Law, Unfair Competition Law, and the Labor Code Private Attorney General Act and for conversion.

In January 2005, immediately before the *Duran* trial court denied Duran and Ramos' motion for leave to amend their complaint, Petitioner's counsel asked the *Alvarez* trial court for leave to amend their complaint to assert class allegations in this case. As Petitioner's counsel explained to the trial court, the proposed class in *Duran* "by definition included the *Alvarez* plaintiffs" and the *Alvarez* plaintiffs had not previously asserted class allegations "because there was an [Unfair Competition Law] cause of action going forward in the . . . [*Duran* case] . . . and had that gone forward to completion, it would have generated a restitutionary award that would have also inured to the benefit of all the plaintiffs [in *Alvarez*]." (Resp. App., at 619-620). In June 2005, after the trial court granted the *Alvarez* plaintiffs' motion for leave

to amend, it granted Respondent's motion to dismiss the class allegations, holding that the *Alvarez* plaintiffs were *collaterally estopped* from re-litigating the class certification issue conclusively decided in *Duran*.[2]

The *Alvarez* plaintiffs thereafter appealed the trial court's decision to the California Court of Appeal, Second Appellate District. The Court of Appeal affirmed the trial court's decision and held that the *Alvarez* plaintiffs were *collaterally estopped* from re-litigating the class certification issue decided in *Duran*. Specifically, the Court of Appeal found (1) that plaintiffs did not have a due process or property right to file a class action on behalf of others; (2) that plaintiffs were not deprived of their right to pursue their individual claims; (3) that the fact the plaintiffs did not receive formal notice of the *Duran* certification proceeding did not preclude a finding that they were *collaterally estopped* by that proceeding; and (4) that all of the elements of *collateral estoppel* – identity of issues, finality, and privity – were present. As the Court of Appeal concluded,

> It is manifestly unfair to subject respondent to a revolving door of endless litigation. In cases, such as this one, where a party had a full opportunity to present his or her claim and adequately represented the interests of a second party who seeks the same

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[2] Following the *Alvarez* trial court's decision, Petitioner's counsel filed a fourth case seeking to certify the same class of area sales managers in Orange County Superior Court. (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 24-a1, n. 3.) In April 2007, however, after the Second Appellate District affirmed the *Alvarez* trial court ruling, the Orange County Superior Court also dismissed class allegations in that case on *collateral estoppel* grounds.

> relief, principles of equity, "[p]ublic policy, and the interests of litigants alike require that there be an end to litigation" [citation omitted].

Alvarez Court of Appeal Decision, Petitioner's Appendix, at 25-a.

On February 7, 2007, the California Supreme Court denied the *Alvarez* plaintiffs' Petition for Review. Shortly thereafter, Respondent settled all of the *Alvarez* plaintiffs' claims except for Petitioner's claim. Following the settlements, the *Alvarez* trial court, at its insistence and for docketing and budgetary reasons, dismissed the *Alvarez* plaintiffs' complaint without prejudice. In the event this Court grants Petitioner's Petition and reverses the judgment of the lower court, the *Alvarez* trial court reasoned, Petitioner could then pursue his class claims in the trial court.

REASONS FOR DENYING THE PETITION

Petitioner contends that his due process rights were violated when, without having received formal notice of the *Duran* certification proceedings, the court below held that he was *collaterally estopped* from re-litigating the certification issue decided in *Duran*. Although Petitioner cites to a number of Supreme Court, United States Court of Appeals, and California state court decisions, he fails to identify a single decision which either conflicts with or draws into question the propriety of the lower court's decision. Indeed, as the lower court noted, there is one case in the country that "deals squarely with the issue" and the lower court's decision is entirely consistent with that case. *See Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 16-a.; *In re Bridgestone/ Firestone, Inc., Tires Products Litigation*, 333 F.3d 763 (7th Cir. 2003) (enjoining a state court from

certifying a nationwide class as it found that putative class members, even in the absence of notice, were *collaterally estopped* from re-litigating a previously decided nationwide class issue).

Moreover, Petitioner fails to demonstrate that the lower court's decision raises a sufficiently important issue requiring this Court's attention. Given the unique circumstances of this case, implicating multiple rulings from different courts over a ten-year period, it is unlikely that the issue will reverberate throughout the courts and reoccur with sufficient frequency to necessitate this Court's review. As a California Court of Appeal opined in a slightly different context, the re-litigation of previously decided class issues is unlikely as "'[o]nly an extraordinarily wealthy, quixotic, and masochistic plaintiff would undertake such a fruitless endeavor.'" *See, Cartt v. Superior Court*, 50 Cal. App. 3rd 960, 969, n. 15 (1975) (citation omitted).

In sum, Petitioner simply quibbles with the lower court's findings and its application of those findings to settled rules of law. For these reasons, this Court should deny Petitioner's petition for a writ of certiorari.

A. A Plaintiff Has Neither a Property Nor a Due Process Right to File a Class Action

As the lynchpin of his questions presented, Petitioner posits that he has a property or due process right to assert class allegations. According to Petitioner, the right to assert class allegations confers "some essential extra to an individual claim" that rises to the level of a constitutionally-protected right. Petition, at 18-19. Indeed, in the court below, Petitioner asserted that the mere threat of a class action enhances the value of an individual claim and that, to deprive

an individual of the right to assert such a threat, is tantamount to a "taking" and deprives that individual of his due process rights. *See* Plaintiffs' Supplemental Letter Brief to the Court of Appeal, at 1 ("the mere assertion of class allegations causes a defendant to recognize a greater potential risk (and, there from, value) in an individual litigant's claim"), at 5 ("the dismissal of class allegations is a denial of due process by virtue of the fact that the dismissal substantively affects and impairs Plaintiffs' claims"). But, as the lower court recognized, neither this Court, nor the California Supreme Court, nor any other court has held – or implied – that the ability to assert class allegations rises to the level of a constitutional right.

As both the California and federal class action rules make clear, the class action device does not in and of itself confer any substantive rights but merely creates a procedure for consolidating matters properly before a court. *See Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1014 (2005) (holding that the state rule governing class actions "does not serve to enlarge substantive rights or remedies"); 28 U.S.C. §2072(b) (specifying that the federal rules, including the rule governing class actions, "shall not abridge, enlarge or modify any substantive right"). It is a "product of the court of equity" and "rests on considerations of necessity and paramount convenience." *City of San Jose v. Superior Court*, 12 Cal. 3rd 447, 458 (1974) (citations omitted); *Daar v. Yellow Cab Co.*, 67 Cal. 2nd 695, 703-704 (1967) (citations omitted). It is designed as "a means to enforce substantive law," but not to create substantive law. *City of San Jose*, 12 Cal. 3rd at 462. As such, both § 382 of the California Code of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure, which codify the doctrine, vest in the courts the power to determine if a class should

proceed and the power to regulate its course. They do not create property or due process rights.

Indeed, in similar types of representative actions, both this Court and the California Supreme Court have held that a plaintiff does not have a property or due process right to pursue claims on behalf of others. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 549-550 (1948) (holding that a representative plaintiff in a shareholder derivative action is a "self-chosen representative," that the federal constitution "does not oblige the state to place its litigating and adjudicative processes at the disposal of such a representative," and that "the state has plenary power over this type of litigation"); *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 233 (2006) (holding that a plaintiff's interests in suing on behalf of others under California's Unfair Competition Law "is not a property right beyond statutory control"); *Hogan v. Ingold*, 38 Cal. 2nd 802, 812 (1952) (holding that a plaintiff in a shareholder derivative action "has no vested property right" to represent others). As the court below observed, there is no reason why a plaintiff in a class action "has any greater right to serve as a representative than a shareholder in a derivative action or a representative of the public in an unfair competition suit." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 14-a.

Petitioner relies principally on *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) to support his argument that he has a due process or property right to assert class allegations. Petition, at 18-19. However, *Discover Bank* is readily distinguishable and does not conflict with the lower court's decision. In *Discover Bank*, the California Supreme Court simply weighed the competing policies behind arbitrations and class actions and found, in the context of a consumer claim

where a consumer's only viable remedy is by means of a class action, that the policy behind class actions trumped the policy behind arbitrations. Not surprisingly, *Discover Bank* never addressed the issue of whether the mere threat of a class action would somehow enhance the value of an individual's claim and rise to the level of a property right. Moreover, the *Alvarez* plaintiffs, including current employees, clearly recognized that they had an individual remedy outside of the class action context as they initially filed their claims in their individual capacities and only sought to add class allegations *after* the *Duran* court issued a series of rulings which they believed were adverse to their interests.

B. A Plaintiff May Be Collaterally Estopped From Re-Litigating a Previously Decided Class Certification Decision, Even in the Absence of Notice of That Decision

In his questions presented, Petitioner contends that due process concerns arise where, as here, a defendant seeks to preclude re-litigation of a certification decision that was issued without formal notice to putative class members. Petition, at 6-8. In fashioning his argument, Petitioner ignores the fact – emphasized in the court below – that such preclusion does not affect putative class members' substantive right to pursue their individual remedies as they would still "remain free to litigate the merits of their personal claims." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 13-a, 21-a. As Petitioner's substantive right to pursue his individual remedy remains unaffected, he can be precluded from re-litigating an earlier certification decision, even in the absence of formal notice, without running afoul of the due process clause.

In marshalling his argument, Petitioner once again fails to point out to the Court the only authority directly on point. The Seventh Circuit, in *In re Bridgestone / Firestone, Inc. Tires Product Liability Litigation*, 333 F.3rd 763 (2003), directly addressed and rejected Petitioner's contention. In *Bridgestone / Firestone*, the Seventh Circuit enjoined a state court from certifying a nationwide class as it found that putative class members, even in the absence of notice, were *collaterally estopped* from re-litigating an earlier certification ruling:

> [N]o statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step. [Citations omitted.] No one is entitled to opt out of the certification [process], a decision necessarily made on a class-wide, all-or-none basis; one opts out of a certified class. And a person who opts out receives the right to go it alone, not to launch a competing class action. Preserving the right to litigate individually, as one's own champion, is the point of opting out. The opt-out avoids any risk of the class's loss on the merits and also forswears any opportunity to take advantage of the class's victory. [Citations omitted.] *Every person included in the district court's class definition still has the right to proceed on his own. What such a person now lacks is the right to represent a national class of others similarly situated; that's the upshot of a fully contested litigation in which every class member was adequately represented on this issue.*

Bridgestone / Firestone, 333 F. 3rd at 769 (emphasis added). So long as the interests of a putative class member were adequately represented in an earlier, fully contested

certification proceeding, no rule, statute or principle of due process requires that he receive notice of that proceeding as a precondition to precluding him from re-litigating the certification decision.[3]

C. A Plaintiff May Be Collaterally Estopped From Re-Litigating A Class Certification Decision if the Plaintiff Is in Privity With the Plaintiff Who Litigated that Decision and if His Interests Were Adequately Protected

In his questions presented, Petitioner further contends that the lower court, in derogation of his due process rights, misstated the reach of the *collateral estoppel* doctrine in holding that he was in "privity" with the *Duran* plaintiffs. Petition, at 9-14. In the process, Petitioner contends, the lower court created an "absolute rule of law" forever holding

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[3] Petitioner cites to a series of California lower appellate court rulings and suggests that those rulings conflict with the ruling in the court below. Petition, at 7-8. If they existed, such conflicts would be of dubious relevance to the Petition. However, Petitioner's case law yields no such conflict. In *Home Savings & Loan Assn. v. Superior Court*, 42 Cal. App. 3rd 1006 (1974), the Court of Appeal did not address the issue of whether notice is required, but, assuming it was required, it addressed the issue of when it must be given. In *Johnson v. American Airlines, Inc.*, 157 Cal. App. 3rd 427 (1984), contrary to Petitioner's representation, the Court of Appeal held that a plaintiff was *collaterally estopped* from attacking a settlement in an earlier class action even though she did not receive formal notice of that action. *See Johnson*, 157 Cal. App. 3rd at 433 (for purposes of *collateral estoppel*, "[t]he courts have held that due process does not require [] notice" in certain types of class actions and "requires only that class members be adequately represented").

that a putative class member is in "privity" with any plaintiff who brings a class action. Petition, at 11. According to Petitioner, the lower court's misstatement of the *collateral estoppel* doctrine is in direct conflict with this Court's, the United States Courts of Appeals', and the California courts' precedent. In reality, however, the lower court simply followed settled *collateral estoppel* principles and applied those principles, following a "close examination," to the particular facts of his case. *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a – 20-a. Therefore, Petitioner's contention fails to set forth a sufficiently compelling reason for this Court's review.

Despite Petitioner's protestations, the articulation of the *collateral estoppel* doctrine by the lower court is entirely consistent with the cases upon which Petitioner relies. As a threshold matter, the lower court, consistent with the cases Petitioner relies on, recognized that the purpose of the "privity" requirement – whereby a non-party to an earlier case can be bound by a decision in that earlier case – is to ensure that the non-party's interest "was adequately represented in the prior proceeding." (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a.)[4] The lower court, consistent with the cases Petitioner relies on, then recognized that for "privity" to exist Petitioner's interests had to be "sufficiently close" to those of the *Duran* plaintiffs so as to render the *Duran* plaintiffs the "virtual representative" of

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[4] *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (holding that adequate representation is a due process prerequisite to precluding a litigant from his day in court if he was not a party to the earlier litigation).

Petitioner in the *Duran* case. (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a.)[5]

Of course, the crux of Petitioner's argument really lies in the lower court's application of the law to the facts of his case. In this respect, Petitioner contends that his interests could not possibly have been adequately represented by the *Duran* plaintiffs as these plaintiffs were found by the *Duran* courts to be "atypical" and "inadequate." Petition, at 14-17. Petitioner is simply wrong. Lest there by any doubt, the *Duran* Court of Appeal held that the *Duran* plaintiffs could never certify their proposed class because of the absence of commonality:

> . . . And, if a similar split in opinion exists company-wide among [area sales managers], it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in interests. *Common questions of fact could not predominate among the 1600 [area sales managers]* . . . .

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[5] *See, e.g., Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985) (the "inquiry is whether the relationship between the party to be estopped and the party in a prior litigation is 'sufficiently close' so as to justify the application of *collateral estoppel*"; citation omitted); *Headwaters, Inc. v. U. S. Forest Service*, 399 F.3rd 1047, 1053-1054 (9th Cir. 2005) (to support a finding of "privity" there must be an "identity of interests" and "adequate representation"); *Victa v. Merle Norman Cosmetics, Inc.*, 19 Cal. App. 4th 454, 464 (1993) (privity "requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action"; citation omitted).

> We recognize that numerous collateral issues are raised by the parties. But in light of our disposition, the other matters are not significant and we do not address them.

(*Duran* Court of Appeal Decision, Pltffs. App., at 164-165.)

"When a trial court judgment decides a case on two alternate grounds, and the appellate court affirms based on one ground, the judgment is binding under principles of . . . *collateral estoppel* only on the ground addressed by the appellate court." *Newport Beach Country Club v. Founding Members of Newport Beach Country Club*, 140 Cal. App. 4th 1120, 1123 (2006). As the *Duran* Court of Appeal affirmed the trial court solely on the ground that the requisite commonality was absent, Petitioner's contention that he cannot be in "privity" with the *Duran* plaintiffs because the *Duran* trial court also found them to be "atypical" and "inadequate" is contrary to the law.

Petitioner then contends that the lower court improperly relied on the fact that his counsel was also counsel of record in the *Duran* case. Petition, at 12-14. First, the lower court relied on this fact only as "one" factor in its analysis and Petitioner has altogether failed to demonstrate that this factor was the decisive factor in the outcome of the case. *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 19-a ("similarity of counsel is *one* factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit"; emphasis added). Second, Petitioner ignores that the lower court relied on this factor solely to illustrate that Petitioner had made "no allegation that the representation provided to the plaintiffs in *Duran* was inadequate." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 19-a. It did not rely on this factor to determine

whether there was a "sufficiently close" relationship between Petitioner and the *Duran* plaintiffs to justify a finding of "privity." As such, its consideration of this factor cannot be said, as Petitioner contends, to chill a plaintiff from otherwise choosing an attorney of choice to protect his or her interests.

D. Petitioner Fails to Set Forth a Compelling Reason for This Court to Grant His Petition

Petitioner has failed to present a compelling reason that would merit this Court's review. Petitioner has failed to demonstrate either that the lower court's decision conflicts with a decision from this Court or a United States Court of Appeal or that the lower court's decision raises overriding constitutional issues requiring this Court's immediate attention. In essence, Petitioner simply advocates for his counsel's right to file the same claim "in as many courts as necessary" until he can secure a favorable result and thus, through re-litigation, "*turn even an unlikely outcome into reality.*" *Bridgestone / Firestone*, 333 F.3rd at 766-767 (emphasis added). He seeks, in other words, to "perpetuate an asymmetric system in which class counsel can win but never lose." *Id.* Obviously, this kind of "asymmetric" enhancement of a class counsel's likelihood of success is not the kind of result suggested by logic or due process.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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